GEORGE SCHULTZ

IBLA 84-817
IBLA 84-818 Decided October 29, 1986

Appeals from a decision of the Utah State Office, Bureau of Land Management, declining to invoke the reverter clauses of Recreation and Public Purposes Act patent 43-68-0031, and a decision of the Moab District Office, BLM, denying a protest of a direct public sale U-52785.

Appeals dismissed.

1. Rules of Practice: Appeals: Standing to Appeal--Rules of Practice: Protests

   A "protest" under the provisions of 43 CFR 4.450-2 only lies where an individual objects to actions which are "proposed to be taken in any proceeding before" BLM. Absent such conditions, an objection by an individual does not necessarily establish that he or she is a "party to the case" within the meaning of 43 CFR 4.410 for the purposes of establishing standing to appeal.

2. Rules of Practice: Appeals: Standing to Appeal

   In order for an individual to establish standing to appeal under 43 CFR 4.410, the individual must show that he or she is a party to the case and that a legally cognizable interest has been adversely affected by the decision being appealed.

3. Public Sales: Generally--Rules of Practice: Appeals: Standing to Appeal

   A challenge to the suitability of land for public sale under 43 U.S.C. § 1713 (1982) is subject to the exclusive appeal procedures set forth in 43 CFR 1610.5-2. To the extent, however, that the method of sale or the procedures used in conducting the sale are challenged, such matters are properly subject to appeal under 43 CFR 4.410.

APPEARANCES: George Schultz, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

On March 18, 1966, the City of Moab (the City), applied to purchase 160 acres of land for public recreational use in accordance with 43 U.S.C. § 869 (1982). 1/ The City asserted that it wished to acquire the land, which was within its watershed, in order to construct a nine hole golf course.

Because no plans or costs for development, use, and maintenance of the land were included with the application as required by items 5a. through 5d. of the instructions, they were requested by the Utah State Office, Bureau of Land Management (BLM), on August 4, 1966. Accordingly, the City resubmitted its application on August 25, 1966. In this application, the City noted that the land was actually desired so that it could add an additional nine holes to its already existing nine holes, thereby resulting in an 18 hole golf course. These documents indicated that the City anticipated spending $1,000 the first year, $30,000 the second year, $77,000 the third year and $6,500 the fourth year, for a 4-year total expenditure of approximately $115,000.

A September 14, 1967, report on the application concluded that it would be "proper to transfer the land * * * to the City of Moab under the provisions of the Recreation and Public Purposes Act * * *. It would be in the public interest to approve this application in order that the City of Moab may expand their recreation program." On April 30, 1968, after classifying the land and receiving payment of $400, BLM issued the patent to the City with the following restrictions:

> This patent is issued under the provision that, if the patentee or its successor attempts to transfer title to or control over the lands to another or the lands are devoted to a use other than that for which the lands were conveyed, without the consent of the Secretary of the Interior or his delegate, title shall revert to the United States.
>
> If the patentee or its successor in interest does not comply with the provisions of the approved plan of development, filed on August 25, 1966 with the Bureau of Land Management, or with the approved plan of management, filed on August 25, 1966 with the BLM, or with any revision thereof approved by the Secretary of the Interior or his delegate, said Secretary or his delegate, after due notice, and opportunity for a hearing, may declare the terms of this grant terminated in whole or in part. The patentee, by acceptance of this patent, agrees for itself and its successors in interest that such declaration shall be conclusive as to the facts found by the Secretary or his delegate and

1/ The application was given serial number U-0149208. It described lands in sects. 14, 15, and 23 in T. 26 S., R. 22 E., Salt Lake Meridian, in Grand County, Utah.

> shall, at the option of the Secretary or his delegate, operate to revest in the United States full title to the lands involved in the declaration.
>
> The Secretary, or his delegate, may in lieu of said forfeiture of title require the patentee or its successor in interest to pay the United States an amount equal to the difference between the price paid for the land by the patentee prior to issuance of this patent and 50 percent of the fair market value of the patented lands, to be determined by the Secretary or his delegate as of the date of issuance of this patent, plus compound interest computed at four percent beginning on the date this patent is issued.

Years passed without event reflected in the BLM record. A 1982 report of a compliance check of the granted lands states:

> To date, the City of Moab has not expanded its Golf Course onto the R&PP land. The land remains essentially as it was at the time of the patent. The Golf Course Manager, Steve Kennedy, advised * * * that the effort to expand the course is a continuing priority. No construction schedule has been established. Since no time frame or specific plan is of record, it would appear that the City of Moab remains in compliance with the R&PP patent.

On September 7, 1983, the City wrote to BLM inquiring as to the possibility of its acquiring the reversionary interest held by the United States:

> The City intends to purchase the reversionary interest only in the event and at the time that the land is sold to a developer along with other acreage owned by the city. It is the City's understanding that neither its negotiating with a proposed developer or its entering into an option agreement with a developer regarding the sale of the 160 acres will be considered as an "attempted sale" or a "sale" under the terms of the patent, and, therefore, the Department of Interior will not assert its right to a reversion of title to the property. The City further understands that the Department of Interior will also not assert its right to be paid the 1968 appraised value of the 160 acres unless and until the transaction between the City and the Developer actually closes and that at that time and event the Department of Interior will, in consideration of the 1968 appraisal value plus interest, convey and release its reversionary rights to the City of Moab or its assignee.
>
> The City requests that the State Office confirm the understanding contained in this letter so that the City may proceed to negotiate with a developer without fear of prejudice to its possessory rights in the 160 acres and without fear of having to pay tens of thousands of dollars to the Department of Interior

> if no sale to a developer occurs. If there is any disagreement regarding the understanding stated herein the City requests that you immediately so advise.

A September 30, 1983, letter to the District Manager sought the same confirmation.

The BLM District Manager responded that the 160 acres "can be resold to the City of Moab in a direct, noncompetitive public sale" and that "the signing of the Option agreement by and between Moab City Corporation, the Moab Community Development Agency, and Arches Gold Associates would not by itself cause BLM to invoke the reversionary clause of R&PP Patent 43-68-0031."

On October 11, 1983, appellant, who apparently desired to locate mining claims on this land (see George Schultz, 81 IBLA 29 (1984)), wrote the BLM State Director setting forth several reasons why the patent was void ab initio and the reverter clauses should be invoked. 2/ The State Director responded on November 4, 1983, that "after review of the circumstances surrounding R&PP Patent No. 43-68-0031, I find no reason to invoke the reversionary clause provisions of the patent." On May 30, 1984, Schultz wrote again, requesting a "full explanation answering the points I raised"; asking again that the reverter clauses be invoked; asking what would be done about a mineral trespass that had occurred on the land in September 1983; and requesting that an oil and gas lease issued for the land be cancelled. The State Director responded on July 5, 1984, that "no new facts have been brought to light" concerning the patent and that "the land has been physically examined and no cause to invoke the reverter clause has been found." Schultz then appealed.

At the same time that Schultz was attempting to get the State Director to invoke the reverter clause in the R&PP patent, he had also filed a protest to a notice of a proposed realty action in which the Moab District Office proposed a private sale of the subject land to the City of Moab pursuant to section 203 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1713 (1982). 3/ His protest was denied by the District Manager on June 12, 1984, and Schultz thereupon appealed.

Appellant has made numerous arguments in support of his contention that the reverter clause should be invoked as well as other arguments relating to why the public sale should not be held. With respect to these issues, however, we have concluded that appellant has failed to establish his standing to appeal.

2/ George Schultz died on Jan. 21, 1986. Pursuant to an order of this Board, his personal representative informed the Board that the estate wished to proceed with the subject appeal.

3/ This proposal is obviously contingent upon the surrender by the City of the R&PP patent. Until such time as title is revested in the United States, it is clear that no patent may issue nor may further action be taken under the proposal, since the lands involved are not public lands subject to sale while they remain under the R&PP patent. See 43 CFR 2710.0-8(a)(3).

[1] The applicable regulation, 43 CFR 4.410(a) provides, in relevant part, that: "Any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management * * * shall have a right to appeal to the Board." In Oregon Natural Resources Council, 78 IBLA 124, 125 (1984), the Board examined this regulation:

> There are two separate and discrete prerequisites to prosecution of an appeal before this Board: (1) that the appellant be a "party to the case," and (2) that the appellant be "adversely affected" by the decision appealed from. See 43 CFR 4.410. Denial of a protest makes an individual a party to a case. Such a denial, however, does not necessarily establish that an individual is adversely affected. Rather, an unsuccessful protestant must show that a legally recognizable "interest" has been adversely affected by denial of the protest. In Re Pacific Coast Molybdenum Co., 68 IBLA 325 (1982).

With reference to the reverter appeal, it is difficult to ascertain how appellant could be a "party to the case" within the contemplation of the regulations. We have noted above that denial of a "protest" makes an individual a party to a case. Appellant clearly filed a document which he denominated as a "protest." The problem, however, is that, by regulation, a protest may only be filed "to any action proposed to be taken in any proceeding before the Bureau." 43 CFR 4.450-2. Under this regulation, an objection filed after BLM has taken action is an untimely protest. See Sierra Club Legal Defense Fund, Inc., 84 IBLA 311, 318, 92 I.D. 37, 41 (1985); Goldie Shodras, 72 IBLA 120, 122 (1983); Duncan Miller (On Reconsideration), 39 IBLA 312 (1979).

Of particular relevance, herein, is the fact that there was no proceeding before BLM in which any action was proposed. Appellant protested the failure of BLM to act, not any action that BLM proposed to take. There was neither a "proceeding" before BLM nor any action that was proposed to be taken. Appellant's filing may be a "protest," but it is not one within the scope of 43 CFR 4.450-2. And as we shall show, Moreover, even were appellant properly deemed a party to the case under 43 CFR 4.410, he had no legally cognizable interest sufficient to establish his standing to appeal from any decision on his "protest."

[2] We note that appellant had located mining claims on the land. See George Schultz, supra. These mining claims, however, were located at a time in which the lands were not open to mineral entry and they were, therefore, null and void ab initio. George Schultz, supra. Any occupancy under these claims was thus, in the nature of a trespass. See United States v. Osterlund, 505 F. Supp. 165 (C.D. Colo. 1981). Under Board precedents, the interest of the trespasser on the land does not afford standing to appeal from a decision relating to the disposal of the land. Fred J. Schikora, 89 IBLA 251 (1985). See also Eugene M. Witt, 90 IBLA 265 (1986). Similarly, we find that an individual has no standing to challenge the failure of BLM to invoke a reverter clause in an R&PP patent where his claim of right is grounded in trespass.

In his statement of reasons in support of the appeal, appellant developed, at great length, his arguments that the decision of the State Director

was not in accord with the law. However, besides a reference to those claims which this Board has already declared invalid, appellant's only other alleged basis for objecting was that the present status of the land prevented him from locating new mining claims thereon.

Such speculative future use is clearly an inadequate basis on which to predicate standing. Thus, in Donald Pay, 85 IBLA 283 (1985), the Board denied standing to an individual who objected to a right-of-way but who alleged no present right, title, or interest in the land. In that case we held that Pay's allegation that he had access to the land and, so, could presumably use the land in the future, was not such a present interest so as to confer standing. So, too, while appellant might well have located claims on the land if the land had been both restored to Federal ownership and opened to mineral entry, such a potential future use does not serve to invest appellant with the present interest necessary to maintain standing. Accordingly, we must dismiss the instant appeal from the decision of the State Director declining to exercise the reverter clause.

Insofar as the proposed private sale is concerned, we agree that appellant was a party to a case in that there was a proceeding before BLM in which proposed action was contemplated. But, here too, we do not believe that appellant has shown a legally cognizable interest adversely affected by the proposal.

[3] We wish to differentiate between two separate aspects of the proposed sale. To the extent that someone challenges the suitability of land for disposal, the Board has held that the procedures set forth at 43 CFR 1601.6-1 (1982) (current version codified at 43 CFR 1610.5-2, 48 FR 20373 (May 5, 1983)) are the exclusive appeal provisions. See Oregon Natural Resources Council, supra at 127. To the extent, however, that someone challenges the mode of disposal (i.e., direct sale rather than competitive sale) or procedures under the sale, these matters are subject to Board review upon the filing of a notice of appeal by an individual who is adversely affected. See Richard D. and Virginia Troon, 93 IBLA 256 (1986); Hazel Anna Smith, 82 IBLA 230 (1984).

A review of appellant's statement of reasons discloses that his primary objections go not to either the mode of disposal or the procedures under the sale but rather to the issue of whether or not the land is suitable for disposal. As noted above, appeals relating to the question must be pursued under 43 CFR 1610.5-2 and are not subject to the Board's jurisdiction. Admittedly, appellant challenged the fact that a direct sale was contemplated. He did not, however, assert that this facet precluded him from making a competitive bid for the land. See Hazel Anna Smith, supra. Rather, the entire thrust of his arguments was that no sale of the land should be undertaken. Absent an allegation that he would bid on the land if a competitive sale were held, the propriety of such a sale is not properly before the Board. See e.g., Mark S. Altman, 93 IBLA 265 (1986). We conclude, therefore, that appellant has failed to establish the requisite interest necessary to maintain his standing to appeal from the denial of his protest to the public sale.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeals are dismissed.

James L. Burski
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge

ADMINISTRATIVE JUDGE IRWIN DISSENTING:

I dissent.

Will A. Irwin
Administrative Judge